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In the

Supreme Court of the United States

October Term, 1948

No. 229

E. J. HOUNSELL, Administrator of the Estate of Nellie Hounsell, Deceased,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Respondent.

Brief of Respondent In Opposition To Petition For Writ of Certiorari

I. OPINION OF THE COURT BELOW.

The full opinion of the Supreme Court of Wisconsin is not set out at page 9 of the Appendix to the Petition for Writ of Certiorari. The recital of the facts by the Court is omitted. The full context is printed at page 65 of the Record and is reported in 252 Wis. 138 (Adv.) and 31 N. W. (2) 203.

II. JURISDICTION.

Respondent opposes the granting of a writ of certiorari on the ground that no substantial federal question is presented.

III. NATURE OF THE CASE.

Petitioner seeks review of a judgment of the Supreme Court of Wisconsin affirming an order entered by the County Court of Fond du Lac County, State of Wisconsin, in administration proceedings in the matter of the Estate of Nellie Hounsell, Deceased, determining the Wisconsin inheritance taxes payable therein.

The order held that one-half of property of the value of $170,843.48, which stood in the joint names of the deceased and E. J. Hounsell, her surviving husband (the Administrator-Petitioner) was subject to Wisconsin inheritance taxation and taxable under the Wisconsin statutes to the surviving husband. He claimed that although the property stood in their joint names it was in fact only his because it was only money earned from his business and his investments that went into the joint properties and that his deceased wife used the bank accounts only at his request.

The County Court of Fond du Lac County and the Supreme Court of the State of Wisconsin both found that title to the property was so fixed as to make the decedent and her surviving husband joint tenants therein and therefore the property came within the terms of section 72.01 (6) of the Wisconsin Statutes of 1945.

IV. STATUTES INVOLVED.

Section 72.01, Wisconsin Statutes of 1945, so far as here material provides:

> "72.01 Subjects liable. A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, * * * to any person, * * * in the following cases, except as hereinafter provided:
>
> "(1) * * *
>
> "(2) * * *
>
> "(3) * * *
>
> "(4) * * *
>
> "(5) * * *
>
> "(6) JOINT INTERESTS. Whenever any property, real or personal, is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer of one-half or other proper fraction thereof taxable under the provisions of this chapter in the same manner as though the property to which such transfer relates belonged to the tenants by the entirety, joint tenants or joint depositors as tenants in common, and had been bequeathed or devised to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such de-

ceased tenant by the entirety, joint tenant or joint depositor, by will.

"(7) * * *

"(8) * * *

"(9) * * *."

Section 230.44, Wisconsin Statutes of 1945, provides:

"230.44 Estates in common. All grants and devises of land made to two or more persons, except as provided in section 230.45, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy."

Section 230.45 of the Wisconsin Statutes of 1945, so far as here material, provides:

"230.45 Joint tenancies. (1) Section 230.44 shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife.

"(2) * * *

"(3) * * *."

Section 230.47 (2), Wisconsin Statutes of 1945 provides:

"(2) An administrator or executor shall include in his inventory the interest which the decedent owned as such joint tenant, or tenant by the entirety, or life estate before his death. The county court shall adjudicate in the final judgment or order for assignment regarding the termination of such joint tenancy, tenancy by the entirety, or life estate and regarding such other facts as are essential to a full and final determination of the rights of the parties interested."

Section 230.48 (2), Wisconsin Statutes of 1945 provides:

"(2) An administrator or executor shall include in his inventory the interest which the decedent owned as such joint tenant, or tenant by the entirety in any real estate mortgage note, bank account, stock, bond, chose in action or other personal property before his death. The county court shall adjudicate in the final judgment or order for assignment regarding the termination of such joint tenancy, or tenancy by the entirety and regarding such other facts as are essential to a full determination of the rights of the parties interested."

V. STATEMENT OF FACTS.

Nellie Hounsell died intestate on December 19, 1946, a resident of Fond du Lac, Wisconsin. (R. 37) She left her husband, E. J. Hounsell, 77 years of age, surviving as her sole heir. (R. 28) Property amounting to $170,853.48, consisting of real estate valued at $10,409.67 and personal property appraised at $160,443.81, stood at that time in the joint names of said decedent and her surviving husband. (R. 7-10, 13)

The real estate consisted of four (4) parcels in the State of Wisconsin conveyed to them by separate instruments dated in January, 1935, January 1939, September 1939 and July 1941, respectively, each naming them both as grantees. (R. 10, 28)

The personal property consisted of three (3) bank accounts in their joint names, and twelve (12) real estate mortgages and one (1) unsecured note, all payable to E. J. Hounsell and Nellie Hounsell, his wife. (R. 8, 9, 13)

Two of these bank accounts were savings accounts. One in the amount of $50,173.62 was with the National Exchange Bank of Fond du Lac, Wisconsin and in the name of "Mr. or Mrs. E. J. Hounsell or the survivor thereof." It had been opened on or before December 12, 1936 and existed continuously to Mrs. Hounsell's death. There were no withdrawals therefrom but only deposits. (Exs. 1 and 2, R. 41-43) The other savings account in the sum of $75,969.41 was with the First-Fond du Lac National Bank of Fond du Lac, Wisconsin in the name of "Mr. & or Mrs. E. J. Hounsell." (Exs. 14 and 15, R. 51-53) It was opened on October 3, 1933, designated No. 32671 and ran continuously to her death. The signature card for this account No. 32671 was signed by both the decedent and her husband on October 3, 1933. It expressly recites that they thereby opened a joint account and agreed that all monies deposited by either or both should be placed to the credit of them jointly, they might be withdrawn upon the request or order of both or either and on the death of either "be the sole and absolute property of the survivor, who shall have the absolute right to withdraw or be paid all monies on deposit." (Ex. 20, R. 58)

The third bank account was a checking account in the amount of $8,402.32 with the First-Fond du Lac National Bank in the name of "E. J. or Nellie Hounsell." (Ex. 16, R. 54) It had been in the name of E. J. Hounsell alone until August 5, 1944 when it was changed to their joint names. (R. 16) The signature card was signed by both on that date and expressly recites that the account is subject to withdrawal by either or the survivor and to the provisions of Section 72.11 of the Wisconsin Statutes which *inter alia*

prohibits a bank from paying over a joint account to the survivor before the inheritance tax is paid thereon or tax clearance obtained. (Ex. 18, R. 56)

The twelve (12) real estate mortgages of varying amounts were either originally payable to or had been assigned to "E. J. Hounsell and Nellie Hounsell, his wife," except one which was payable to "E. J. Hounsell and wife" and another which was payable to "E. J. Hounsell and Nellie Hounsell." (R. 14) They were executed or assigned to them on the following dates: Aug. 17, 1932; Oct. 19, 1935; Aug. 5, 1936; Sept. 1, 1936; May 18, 1940; April 16, 1943; Feb. 6, 1945; July 3, 1945; July 31, 1945; Dec. 8, 1945; Dec. 21, 1945 and Dec. 21, 1945, respectively. (R. 8-10, 28) The unsecured note for $528.60 dated October 17, 1941 ran to "E. J. Hounsell and Nellie Hounsell, his wife."

The foregoing facts were adduced at the hearing before the County Court for Fond du Lac County, State of Wisconsin, to determine the Wisconsin inheritance taxes payable in the administration proceeding of Mrs. Hounsell's estate. E. J. Hounsell, the surviving husband who was also the administrator, testified that all the money which went into these joint properties came from a sporting goods business he had operated for 49 years; that Mrs. Hounsell made deposits of money derived therefrom when he wanted her to and he did not have time to go to the bank; that at his specific request she several times drew monies from the savings account and put it in the checking account because he had bills which he then paid from the checking account; that the accounts were in their joint names so "in case I was busy or sick or something she could go to the bank and deposit"; that he included all income from the joint properties as his own in his income tax returns; that he

collected all interest or rent from the joint properties; and that he kept in his possession all mortgages, deeds and papers relating to the joint properties. All of this testimony was received subject to the objection that it was inadmissible under Section 325.16 of the Wisconsin Statutes as evidence of transactions by him with the deceased. (R. 19)

The County Court nevertheless considered all this testimony and found that upon the evidence and testimony the property in the joint names was under the law of the State of Wisconsin held in joint tenancy and therefore, under Section 72.01 (6) of the Wisconsin Statutes of 1945, inheritance taxes were payable on one-half thereof. Upon then addressing itself to the admissibility of the testimony of E. J. Hounsell, the County Court held that it was inadmissible under said Section 325.16 of the Wisconsin Statutes. (R. 28-32) E. J. Hounsell as administrator appealed from that part of the order determining inheritance taxes entered July 14, 1947 (R. 33) which determined the taxes payable in respect to the joint property. (R. 63)

The Supreme Court of Wisconsin upon considering all the evidence held that under the law of Wisconsin the property was so fixed as to be held in joint tenancy by the decedent and her husband and therefore one-half interest therein was taxable to the surviving husband under the express terms of Section 72.01 (6) Wisconsin Statutes of 1945. (R. 67) It also affirmed the lower court in holding that the testimony of E. J. Hounsell was inadmissible because Section 325.16 Statutes of Wisconsin of 1945 renders him incompetent to testify to transactions with the decedent. (R. 69)

VI. ARGUMENT.

Respondent asserts that no substantial federal question is presented for the following reasons:

A. THE MATTER PRESENTED IS NOT A FEDERAL QUESTION BUT SOLELY ONE OF LOCAL LAW.

The Supreme Court of Wisconsin did not hold that it construed Section 72.01 (6) Wisconsin Statutes of 1945 as precluding consideration of the facts as to the title of the property, as stated by petitioner. (Petition p. 2, Brief pp. 5, 6 and 7) On the contrary both the state trial court and the Supreme Court of Wisconsin fully considered all the facts adduced and held that even including the testimony of E. J. Hounsell, which was held to be inadmissible, the property was held in joint tenancy. (R. 32, 67)

The objective of the petitioner in the state courts was to establish that, notwithstanding the properties stood in the joint names, they were not held in joint tenancy. Whether or not there existed a joint tenancy depends upon the facts and the application thereto of the law of the State of Wisconsin. The Supreme Court of Wisconsin addressed itself to the contention of the petitioner, considered all the evidence, even though some was inadmissible, and held that under the general law of Wisconsin a joint tenancy existed. It specifically said:

> "The title to the real and personal property involved in this appeal was so fixed as to make E. J. Hounsell and his wife joint tenants and to bring the property for inheritance purposes, under the terms of Sec. 72.01 (6) Stats. 1945." (R. 67)

It reviewed the law of Wisconsin and particularly the decision in *Estate of Staver*, (1935) 218 Wis. 114, 260 N. W. 655, wherein it was held that where property stands in the joint names of two persons a joint tenancy exists so that the survivor takes title unless there is presented clear and satisfactory evidence establishing a transaction which amounts to a trust or the existence of an agency. There was specific decision that neither of these exceptions existed in the instant case but that rather there was "an evident pattern or policy of joint ownership by the husband and wife of their property." (R. 68)

It has long been the established law of Wisconsin that conveyance to husband and wife makes them joint tenants of the property. *Wallace v. St. John*, (1903) 119 Wis. 585, 97 N. W. 197. Also it is the law of Wisconsin that where property is held in joint tenancy by husband and wife title to the wife's interest in the property "was devolved upon him by the death of the wife and is therefore liable to taxation under the provision of Sec. 72.01 Stats." *Will of Ray*, (1925) 188 Wis. 180, 205 N. W. 917.

Accordingly the Supreme Court of Wisconsin applied the general law of Wisconsin to the facts of this case and held that as a result of the facts not establishing a trust or an agency, the terms of Section 72.01 (6) Wisconsin Statutes of 1945

> "* * * leave no room for questioning from where the interest of each of the parties came. It states the rule as affecting cases of this character, and the only exception which exists in favor of a surviving tenant is where the joint title has come into being under, and is a part of, a transaction clearly indicating a trust relation or the existence of an agency only. Otherwise, all

that is needed to set the statute in motion is to have the property in the joint names of the parties. * * *" (R. 68)

Very clearly the decision of the Supreme Court of Wisconsin in this case was grounded upon local law and its construction and application of Section 72.01 (6) Wisconsin Statutes was based thereon. The review of such a matter of purely local concern is not within the cognizance of the Supreme Court of the United States. *Manhattan L. Ins. Co. v. Cohen,* 234 U. S. 123, 136, 34 S. Ct. 874, 58 L. ed. 1245; *Ross v. Oregon,* (1912) 227 U. S. 150, 164, 33 S. Ct. 220, 57 L. ed. 458.

The construction of a state statute by the highest court of the State must be accepted by this Court in testing its validity under the Constitution of the United States. *Quong Ham Wah Co. v. Ind. Accid. Comm. of Calif.,* (1921) 255 U. S. 445, 41 S. Ct. 373, 65 L. ed. 723; *Tampa Waterworks Co. v. Tampa,* (1905) 199 U. S. 241, 26 S. Ct. 23, 50 L. ed. 170; *International Harvester Co. v. Wis. Dept. of Taxation,* (1944) 322 U. S. 435, 64 S. Ct. 1060, 88 L. ed. 1373.

This Court will follow the construction placed upon a state statute by the highest court of the State in order to determine whether a federal right is involved. *McElvaine v. Brush,* (1891) 142 U. S. 155, 12 S. Ct. 156, 35 L. ed. 971; *MacKay Tel. & Cable Co. v. Little Rock,* (1919) 250 U. S. 94, 39 S. Ct. 428, 63 L. ed. 863.

A state possessing the power to impose an inheritance tax, whether or not a certain interest was correctly subjected to the tax under the circumstances is purely a state question which is not reviewable by this Court. *Nickel v. Cole,* (1921) 256 U. S. 222, 41 S. Ct. 467, 65 L. ed. 900.

This Court is without jurisdiction to review the decision of the Supreme Court of Wisconsin in this case because there is no substance in the federal question upon which it depends to give it jurisdiction. *Great Northern R. Co. v. Alexander,* (1918) 246 U. S. 276, 38 S. Ct. 237, 62 L. ed. 713.

B. THE IMPOSITION OF THE TAX IS CLEARLY WITHIN THE JURISDICTION OF THE STATE TO TAX.

The assertion of the petitioner that Section 72.01 (6) Wisconsin Statutes of 1945, as interpreted and applied by the Supreme Court of Wisconsin precludes consideration of evidence and therefore is violative of the due process provision of the 14th Amendment to the Constitution of the United States is wholly without merit. The Supreme Court of Wisconsin did consider all the evidence and held that under the law of Wisconsin as applied thereto a joint tenancy existed in the property. As there devolved to the husband by survivorship the interest the deceased wife had in the property such passage of proprietorship is a proper subject of taxation by the State of Wisconsin and clearly within its taxing power and jurisdiction. The interest passed pursuant to and under the law of Wisconsin. The property was located in the State of Wisconsin. The decedent was a resident of Wisconsin and died within its boundaries. The surviving husband resides in the State of Wisconsin. His interest in the property is governed by and dependent on the law of Wisconsin.

The case of *Hoeper v. Tax Comm.,* (1931) 284 U. S. 206, 52 S. Ct. 120, 76 L. ed. 248, is not remotely in point. There the tax was payable by the husband on income he

did not receive and to which he had no right. Here the tax is laid upon the devolvement to the husband by survivorship of the interest which his deceased wife had in the property. He received an interest in the property which he did not possess immediately prior to her death. It is upon this interest that the tax is laid.

Taxation of that interest in jointly held property which passes by survivorship is valid and proper. *Tyler v. U. S.*, (1930) 281 U. S. 497, 50 S. Ct. 356, 74 L. ed. 991; *Gwinn v. Com'sr.*, (1932) 287 U. S. 224, 53 S. Ct. 157, 77 L. ed. 270; *Griswold v. Helvering*, (1933) 290 U. S. 56, 54 S. Ct. 5, 78 L. ed. 166; *U. S. v. Jacobs*, (1939) 306 U. S. 363, 59 S. Ct. 551, 83 L. ed. 763.

The provisions of sec. 72.01 (6) Wisconsin Statutes 1945 were enacted by Chap. 322, Laws of 1917, long before the joint tenancies here involved were created. There is thus no question of retroactive application of this tax statute.

Furthermore, it is well settled in the law of Wisconsin that the principles of joint tenancy are applicable to and pertain to personal property as well as real property. *Will of Meckler*, (1944) 246 Wis. 5, 16 N. W. (2) 373; *Will of Levy*, (1940) 234 Wis. 31, 289 N. W. 666; *Estate of Abddulah*, (1934) 214 Wis. 336, 252 N. W. 158.

In any event the declaration in Section 72.01 (6) Wisconsin Statutes that the interest in jointly held property which passes by survivorship is deemed a transfer and taxable as such, is valid as a legislative declaration reasonably requisite to prevent evasion of taxation. *Helvering v. City Bank Farmers Trust Co.*, (1935) 296 U. S. 85, 56 S. Ct. 70, 80 L. ed. 62.

The decision of the Supreme Court of Wisconsin in the case, and the denial of the motion for rehearing on the apparent ground that the assertion of a federal question was lacking in merit, are so plainly right as to not require reargument, and therefore no substantial federal question is presented. *Re Boardman,* (1897) 169 U. S. 39, 48 S. Ct. 291, 42 L. ed. 653; *Re Spies,* (1887) 123 U. S. 131, 8 S. Ct. 22, 31 L. ed. 80.

For the above reasons the writ of certiorari should be denied.

Respectfully submitted,

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